Before the
**FEDERAL COMMUNICATIONS COMMISSION**
Washington, D.C. 20554

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| In the Matter of | ) | |
| | ) | RM-11303 |
| Petition for Rulemaking of Fibertech Networks, LLC | ) | |
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**COMMENTS OF SUNESYS, INC. IN SUPPORT OF**
**PETITION FOR RULEMAKING OF FIBERTECH NETWORKS, L.L.C.**

Respectfully submitted,

**SUNESYS, INC.**

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## TABLE OF CONTENTS

# SUMMARY

Sunesys, Inc. ("Sunesys") files these Comments in support of the Petition for Rulemaking of Fibertech Networks, L.L.C. (the "Fibertech Petition") in the above-captioned matter. Sunesys is a leading provider of non-switched, digital fiber-optic communications networks capable of providing high-speed dedicated access and multiplexing services, and Sunesys is certified to provide telecommunications services in a number of states.

In the Local Competition Order released in 1996, the Commission did not establish a comprehensive regulatory regime regarding pole attachments, but cautioned that it would monitor the effect of its approach and propose more specific rules if reasonably necessary to facilitate access and develop competition. The time for more specific rules has come. Sunesys respectfully submits that the Commission should grant the Fibertech Petition and commence a rulemaking to address the issues raised therein in order to ensure that facilities-based competition is promoted – not deterred. As more fully discussed in these Comments,

- The charges for access to utility poles, ducts, conduits and rights-of-way are frequently exorbitant, particularly where lower cost alternatives exist, thereby substantially stifling access and competition. For example, utilities often demand that in consideration for agreeing to attachments, Sunesys must fully fund utility pole upgrades that are not required by law.

- The delays in providing access are often unquestionably excessive, and occur at multiple stages of the process, further compounding the harm. Utilities frequently fail to respond to Sunesys' pole attachment applications for approximately six months or more. To make matters worse, the time period for completing the make-ready work once it has been paid for is often excessive. As a result, in many instances the delays between the submission of pole attachment applications and the grant of the pole attachment permits exceed fifteen months, and in a number of instances in the case of one utility were in excess of four years.

- The timing of the completion of the make-ready work is often entirely unpredictable, and therefore Sunesys cannot predict with confidence for its customers when it will begin providing service. Customers, however, generally want service by a certain date, and thus such uncertainty further stifles competition.

- The utilities' conduct often renders Sunesys unable to economically provide services that its customers want and that it otherwise would provide, and has caused Sunesys to forego competing in certain markets altogether where it has determined that due to the actions of the utility, it would not be economically feasible to offer services.

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**COMMENTS OF SUNESYS, INC. IN SUPPORT OF PETITION FOR RULEMAKING OF FIBERTECH NETWORKS, L.L.C.**

Sunesys, Inc. ("Sunesys"), by undersigned counsel, hereby submits these Comments in support of the Petition for Rulemaking of Fibertech Networks, L.L.C. (the "Fibertech Petition") in the above-captioned matter.[1]

Sunesys is a leading provider of non-switched, digital fiber-optic communications networks capable of providing high-speed dedicated access and multiplexing services. Sunesys' customers include large commercial, non-profit, and government entities. As a competitive service provider certified to provide telecommunications services in New Jersey, Pennsylvania, Maryland, Delaware, District of Columbia, New York, North Carolina, Ohio, Illinois and Virginia (through an affiliate, Sunesys of Virginia, Inc.), Sunesys is intimately familiar with the statutes and regulations governing pole attachments, and the practices of utilities in response to Sunesys' requests for timely, reasonable and nondiscriminatory access to the poles.

As set forth herein, Sunesys respectfully submits these Comments in support of the Fibertech Petition and requests that the Commission grant the Fibertech Petition and commence a rulemaking to address the issues raised therein, as these issues greatly impact the deployment of facilities-based telecommunications services.

[1] Petition for Rulemaking of Fibertech Networks L.L.C., RM-11303 (2005).

## I. **Background**

In the Local Competition Order released in 1996, the Commission recognized that because it was not then establishing a comprehensive regulatory regime regarding pole attachments, such approach might result in more disputes between parties than would otherwise arise.[2] The Commission further cautioned that it would "monitor the effect of this approach and propose more specific rules at a later date if reasonably necessary to facilitate access and the development of competition…."[3] The Fibertech Petition and these Comments demonstrate that the Commission's existing pole attachment regulations and policies have not sufficiently protected the Congressionally-mandated goals of access and competition, and have instead resulted in uncertainty and harm to competitive facilities-based providers who are subject to the unreasonable practices identified by Fibertech and Sunesys. Without a doubt, the time for more specific rules has come. The Commission should grant the Fibertech Petition and adopt rules consistent with, at a minimum, several of Fibertech's requests, as discussed herein.

As an initial matter, it is beyond dispute that utilities, which have received "substantial assistance from state governments in acquiring their networks,"[4] have historically controlled, along with local telephone companies, the bottleneck facilities that other companies must access to compete.[5] During the 1960s and 1970s, cable

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[2] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order, 11 FCC Rcd. 15499, 16067-68 (¶ 1143) (1996) ("Local Competition Order").
[3] Id.
[4] Gulf Power Co. v. United States, 187 F.3d 1324, 1326 ($11^{th}$ Cir. 1999) ("Gulf Power").
[5] Alabama Power Co. v. FCC, 311 F.3d 1357, 1361-62 ($11^{th}$ Cir. 2002) ("Alabama Power").

companies demonstrated that utilities were using their superior market position to engage in widespread overcharging for use of their poles.[6] As a result, in 1978 Congress enacted the Pole Attachment Act, 47 U.S.C. Section 224, seeking to curb the anti-competitive tendencies of the utilities.[7] The Pole Attachment Act prohibited utilities from engaging in unfair pole attachment practices, and gave the Commission the right to regulate the rates of utility charges for access to poles where a utility had agreed to provide such access.[8]

In light of the development of telecommunications technologies during the 1980s and early 1990s, in 1996 Congress amended 47 U.S.C. Section 224. The amendments to Section 224 were very significant. They required utilities to provide access to their poles (and conduits, ducts and rights-of-way) on non-discriminatory terms and conditions to not only cable companies, but to telecommunications providers as well.[9]

The amendments to Section 224 resulting in the strengthening of the pole attachment statute were undoubtedly necessary. In the late 1980s, the Supreme Court found that "utility company poles provide … virtually the only practical physical medium for the installation of television cables,"[10] and several years later it became readily apparent that telecommunications companies similarly need access to utility poles (as well as conduits, ducts and rights-of-way) for their wiring.[11]

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[6] Gulf Power, at 1326.
[7] Southern Company Services, Inc. v. FCC, 313 F.3d 574, 576 (D.C. Cir. 2002) ("Southern Company").
[8] Id. at 576-77.
[9] Id. at 577.
[10] FCC v. Florida Power Corp., 480 U.S. 245, 247 (1987)
[11] Gulf Power, 187 F.3d at 1327.

Moreover, as the Commission and Congress have both recognized, the parties in a pole attachment negotiation do not have equal bargaining positions.[12] In fact, the Commission has found that a utility's position in a pole attachment negotiation is virtually indistinguishable from that of an incumbent local exchange carrier ("ILEC") in an interconnection negotiation, where an ILEC has "scant, if any, economic incentive to reach agreement" regarding interconnection since the competitive local exchange carrier will use those rights to compete with the ILEC.[13]

Not surprisingly, the Commission has held that the purpose of the 1996 amendments to Section 224 was to "remedy the inequitable position between pole owners and those seeking pole attachments."[14] Unfortunately, as the Fibertech Petition and these Comments demonstrate, the inequities continue to exist and are causing tremendous harm to facilities-based competitive providers such as Fibertech and Sunesys – as well as their customers -- in connection with the delivery and receipt of services. Specifically (i) the charges for access to utility poles, ducts, conduits and rights-of-way are frequently exorbitant, particularly where lower cost alternatives exist, thereby substantially stifling access and competition; and (ii) the delays in providing access are often unquestionably excessive, and the timing of the completion of the make-ready work is entirely unpredictable.

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[12] Implementation of Section 703(e) of the Telecommunications Act of 1996, Notice of Proposed Rulemaking, 12 FCC Rcd. 11,725, 11731 (¶ 12) (1997) ("NPRM to Implement Section 703"); Implementation of Section 703(e) of the Telecommunications Act of 1996, 13 FCC Rcd. 6,777, 6784, 6794 (¶¶11, 31) (1998) ("1998 Order Implementing Section 703").

[13] 1998 Order Implementing Section 703, 13 FCC Rcd. at 6789 (¶21).

[14] Id. at 6794 (¶31).

In light of these continuing practices by many utilities, both access to poles and competition are greatly undermined, in complete contravention of Congress' objectives. As the Commission stated, Congress wanted to develop and promote competition by ensuring that telecommunications providers receive fair and non-discriminatory access at reasonable rates to utility poles,[15] and, importantly, Congress recognized that in the absence of such access, "significant barriers to competition" would exist.[16] The time has come to eliminate those barriers and foster further facilities-based competition. The time has come to ensure that facilities-based providers have a fair opportunity to compete. To do so, the Commission should grant the Fibertech Petition and adopt at least several of the proposals contained therein, as discussed below.

## II. New Rules Are Required To Curb Utilities' Imposition Of Exorbitant Charges Where Reasonable Lower Cost Alternatives Exist

As described below, utilities frequently seek to charge Sunesys amounts far in excess of what is necessary – or permitted -- for requested attachments. Ironically, utilities, who dwarf Sunesys in size, effectively treat Sunesys as a "deep pocket" who they can use to bankroll the resolution of some of their other concerns, such as replacing or upgrading aging, yet fully compliant, facilities. Such unreasonable practices, which could be circumvented by the use of boxing and extension arms in the circumstances identified by Fibertech, substantially hinder the ability of Sunesys to obtain reasonable access to poles, thereby preventing full and fair competition. Accordingly, the Commission should institute a rulemaking designed to identify rules –

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[15] Id. at 6780, 6781 (¶¶2, 5).
[16] NPRM to Implement Section 703, 13 FCC Rcd. at 11731 (¶12).

such as those specified by Fibertech - that will effectively prevent utilities from imposing exorbitant charges where reasonable alternatives exist.

Specifically, utilities often demand that in consideration for agreeing to attachments, Sunesys must fully fund utility pole upgrades that are not required by law. For example, the National Electric Safety Code (the "Code") expressly provides that, with limited exceptions not applicable here, existing installations that currently comply with prior editions of the Code do not need to be modified to comply with the then current edition of the Code.[17] Importantly, the Code further provides that no modifications are necessary - even if alterations are made to the existing structure (which would include additional attachments) - so long as the structure, once the attachments are made, would still be in compliance with the edition of the Code in effect at the time the structure was initially installed.[18] Nevertheless, Baltimore Gas and Electric ("BG&E") personnel have refused to allow attachments to numerous poles unless Sunesys agrees to pay for expensive upgrades to the pole lines that will place them in compliance with current Code standards – even though the Code does not require this. Simply put, BG&E wants Sunesys to pay for major upgrades to the pole lines that are not required under any law, and if Sunesys does not agree, BG&E refuses to permit the attachment. BG&E apparently views this process as a means by which to have its poles upgraded for its own benefit, but at Sunesys' expense and without legal justification for its actions.

[17] National Electric Safety Code, §1, ¶13B(2) (2002 Edition) ("NESC").
[18] Id. at §1, ¶13B(3).

Unfortunately, for Sunesys and its customers, this overreaching by utilities often renders Sunesys unable to economically provide services that its customers want and that it otherwise would provide. For example, Sunesys has abandoned efforts to provide wide area network services to an interested school district in Maryland because the excessive make-ready charges demanded by BG&E rendered the project economically unfeasible, despite the obvious value to the school district of dedicated broadband services, which the Commission supports as a matter of regulatory policy and subsidizes through the Universal Service Fund. In that instance, BG&E, without legal justification and contrary to Code standard, sought to require Sunesys to fund a replacement of a substantial number of poles on the pole line as a condition of permitting Sunesys to make its attachments.

Moreover, in other instances, while Sunesys may still be able to provide services, the economics become far less attractive, as Sunesys is forced to spend extra funds to provide utilities with a windfall. As a result, competition is stifled. For example, the make-ready work on the only project Sunesys has completed in BG&E territory resulted in a bill of $185,000 for 187 poles. This bill would have been far less were it not for BG&E's insistence that it would only permit the attachments if sag distances were upgraded as part of the make-ready process, even though such upgrades were not legally required, and resulted in a significant increase in the number of poles to be replaced.

As Sunesys is learning first hand, the Commission is correct when it concludes that unreasonable rates for pole attachments can create significant barriers to competition.[19]

[19] NPRM to Implement Section 703, 12 FCC Rcd. at 11731 (¶12).

Sunesys has ceased attempts to enter the market in Delaware as a result of Connectiv's high costs and lengthy delays for make-ready experienced when Sunesys attempted to provide a customer with a fiber optic connection between that customer's facilities in Pennsylvania and Delaware. Although only 1-1/2 miles of that connection was located within Connectiv's territory, the make-ready costs required and delays by Connectiv in granting pole licenses were so significant that Sunesys was forced to license another carrier's fiber to service the customer, rather than continue to attempt to obtain access to the poles to construct its own facilities. In light of these difficulties, Sunesys has determined that it would not be economically feasible to compete in Delaware.

The Commission can greatly reduce the frequency of such unreasonable charges by initiating a rulemaking pursuant to the Fibertech Petition, and in such rulemaking adopt rules consistent with Fibertech's proposal to "allow use of boxing and extension arms where ...such techniques would render unnecessary a pole replacement or rearrangement of electric facilities," and certain other conditions are met.[20] By doing so, where utilities adopt unreasonable positions relating to the Code, Sunesys at least will only have to pay for boxing or extension arms, and not fund new pole lines. Moreover, if the Commission adopts rules consistent with this Fibertech proposal, in other instances as well, utilities will not be able to require exorbitant payments for new pole lines when alternatives such as boxing or extension arms will suffice. As a result, Congress' goals of competition and access will be promoted.

[20] Fibertech Petition at 5.

## III. New Rules Are Required To Curb Utilities' Practices Resulting In Excessive Delays and Unpredictability of Timing

The Commission has recognized the critical importance of timely access to utility poles, ducts, conduits and rights-of-way. As the Commission has found,

> We agree with attaching entities that time is critical in establishing the rate, terms and conditions for attaching. Prolonged negotiations can deter competition because they can force a new entrant to choose between unfavorable and inefficient terms on the one hand or delayed entry and, thus, a weaker position in the market on the other.[21]

The Commission has made it clear that lengthy delays in resolving access issues are "not ... conducive to a pro-competitive, deregulatory environment" and can "delay a telecommunications carrier's ability to provide service and unnecessar[ily] obstruct the process."[22] Courts similarly have recognized that timely access is critical: "The utility is statutorily required to grant prompt, nondiscriminatory access and may not erect unreasonable barriers or engage in unreasonable delaying tactics."[23] As demonstrated by Fibertech, and as confirmed by Sunesys below, because utilities often engage in unreasonable practices that prohibit timely access, the Commission should propose more specific rules to facilitate access and encourage competition – consistent with the Commission's commitment in the Local Competition Order to do so, in appropriate circumstances such as these.

It is beyond dispute that Sunesys has frequently been the victim of unreasonable delaying tactics by utilities, and Sunesys knows all too well that significant delays can eliminate a competitive facilities-based provider's ability to offer services to a

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[21] 1998 Order Implementing Section 703, 13 FCC Rcd. at 6787-88 (¶17).
[22] Id. at 6788 (¶17).
[23] Southern Company, 313 F.3d at 583.

customer. Not surprisingly, customers generally want service by a certain date and if Sunesys cannot deliver because of utility delays, customers will go elsewhere for the service. This is not an area where the phrase "better late than never" applies. Here, when a carrier cannot provide timely service to a customer, that carrier may never get a chance to provide service to that customer at all.

For example, Sunesys signed a contract with a customer to provide service in Public Service Electric and Gas Company ("PSE&G") territory, with an anticipated delivery date to the customer of nine months. PSE&G failed to perform the make-ready work necessary to allow Sunesys to construct its plant on a timely basis, claiming that it lacked sufficient resources to meet the requested timetable. When Sunesys could not meet the customer's delivery date nor provide a reasonable estimate of a later delivery date, because of PSE&G's refusal to provide timetables or perform the work, the customer contacted PSE&G directly to attempt to obtain that information. PSE&G instead contracted directly with the customer and, using PSE&G crews, quickly constructed the necessary fiber in the power space and leased it to the customer directly. PSE&G apparently had no trouble finding the resources to support the customer once it took over the account – which Sunesys had lost due to PSE&G's dilatory action. After completing this construction, PSE&G finally performed the then unnecessary make-ready work for Sunesys – leaving Sunesys with a large bill but no customer.

The above example is not an aberration. While obtaining access quickly is critical to the competitive provider, utilities nevertheless often act at a snail's pace. As an initial matter, utilities frequently fail to respond to Sunesys' pole attachment applications for approximately six months or more. For example, Sunesys filed three applications with BG&E in May 2004, and did not receive any response from BG&E until February 2005 – nearly nine months later. In another state, Sunesys filed its applications in March 2005 and heard nothing from the utility until almost 6 months later.

To make matters worse, once the parties have agreed to move forward with the requested attachments, Sunesys often has no idea how long the utility will take to perform the make-ready work after Sunesys has paid for such work – and the time period is frequently excessive to say the least. In those instances, Sunesys acts almost like a bank that is giving interest free loans to the utilities, as Sunesys has paid what it owes (and in many instances far more than it owes) but then has to wait for an excessive and unpredictably lengthy period of time before it has use of the poles.

As a result of the utilities' dilatory conduct in processing pole attachment applications and performing make-ready work, in many instances the delays between the submission of pole attachment applications and the grant of the pole attachment permits have exceeded fifteen months, and in a number of instances in the case of PSE&G were in excess of four years. Sunesys also experienced tremendous delays by Connectiv in New Jersey, where it required more than sixteen months for Connectiv to perform the make-ready necessary to permit construction of a wide area network for a New Jersey public school system in Connectiv's New Jersey territory, thus delaying the school system's broadband initiative for almost a full year.

These excessive delays greatly harm Sunesys and other competitive facilities-based providers, as they result in extraordinarily lengthy lead times to provide service to customers, who in many instances require service on much shorter deadlines. Thus, delays in obtaining access to the poles caused by utilities' actions are certainly a barrier to competition and discourage customers from seeking alternative facilities-based solutions to those provided by the incumbent. To add insult to injury, these delays not only often preclude competitive providers from providing service to meet customers' then current needs, but can make it more difficult for them to credibly compete for future business. In fact, in several instances, some of which are noted above, Sunesys has effectively been forced to forego entering certain markets or refrain from seeking business from customers that it may have otherwise obtained due to such utility delays.

To reduce the delays described above, Sunesys respectfully requests that the Commission grant the Fibertech Petition and initiate a rulemaking designed to address these issues, and then in such proceeding adopt Fibertech's request for shorter survey and make-ready time periods, as well as Fibertech's request to allow competitors to hire utility-approved contractors to perform field surveys and make-ready work. Currently, the survey period is 45 days (and utilities often take, as discussed above, 6 months or longer). But, as Fibertech describes, there is no reason that such periods could not be reduced to 30 days. And, if the utility does not have the manpower to do it that quickly, then telecommunications providers should be allowed to hire utility approved contractors.

Equally significant, although make-ready work is required to be completed in a nondiscriminatory and reasonable timeframe,[24] there is currently no specific length of time by which utilities must complete make-ready work. This regulatory gap results in situations in which Sunesys not only often has no idea when the work will be completed

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[24] See 47 U.S.C. §224(b)(1), (f)(1).

(which makes it impossible to predict with confidence service to a customer by any particular deadline) but the delays are often unquestionably excessive. Accordingly, the time has come for the Commission to conclude that utilities should not be permitted to continue to have uncapped and unspecified maximum durations of time in which to complete the make-ready work because such excessive delay (1) deters– rather than promotes – competition; and (2) is unworkable for telecommunications carriers and their customers, given that both groups need a strong sense of predictability as to timing, and yet they have none.

Accordingly, there must be clarity as to the time in which the utility will have to complete the make-ready work.[25] Fibertech's proposal of 45 days from payment would provide that clarity. It would also prevent utilities from stifling competition by exploiting the fact that they have an uncapped and unspecified period of time in which to perform the work. Also, placing a definitive period of time on such work may reduce the number of disputes that will be raised at the Commission.[26]

* * *

Finally, Commission grant of the Fibertech Petition is supported not only by the goals and objectives of Section 224 and the promotion of competition in general, but also by Section 257, which provides for the elimination of "market entry barriers for entrepreneurs and other small businesses in the provision and ownership of

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[25] In a separate aspect of the pole attachment laws, the Commission made it clear that there needs to be clarity with regard to the rates that utilities can charge for such attachments. 1998 Order Implementing Section 703, 13 FCC Rcd. at 6823 (¶102).

[26] See also, Amendment of Rules and Policies Governing Pole Attachments, 15 FCC Rcd. 6453, 6460-61 (¶9) (2000) (regulatory framework should require a minimum of staff, paperwork and procedures from the standpoint of the Commission).

telecommunications services and information services."[27] As the Commission has stated, "market entry barriers are minimized for small cable operators and telecommunications carriers by the application of Section 224 which requires just, reasonable and nondiscriminatory rates."[28]

## IV. Conclusion

The Commission's concerns regarding the pole attachment rules have come to pass, namely that the rules adopted in the Local Competition Order have proven to not sufficiently facilitate access and develop competition. Accordingly, for the foregoing reasons and those set forth in the Fibertech Petition, the Commission should grant the Fibertech Petition.

Respectfully submitted,

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[27] 47 U.S.C. § 257(a) (2004).
[28] See also, Amendment of Rules and Policies Governing Pole Attachments, Notice of Proposed Rulemaking, 12 FCC Rcd. 7449, 7470 (¶48) (1997)